

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

JALON TED TAYLOR,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2017-000546

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by counsel's failure to explain to Petitioner that the plea judge could order the sentences to be served consecutively?

STATEMENT

In March of 2011, the Lexington County Grand Jury indicted Petitioner Taylor for possession of stolen goods, indictment #2011-GS-32-641. In November of 2011, the Lexington County Grand Jury indicted Petitioner for forgery and attempted murder, indictments #2011-GS-32-3399, 3506. On March 15, 2012, Petitioner appeared before the Honorable William P. Keesley and pled guilty to possession of stolen goods, forgery and the lesser included offense of assault and battery first degree. Kristy Grafton Goldberg represented Petitioner at the plea. Kate Whetstone Usry was present on behalf of the State. Judge Keesley sentenced Petitioner to five (5) years for possession of stolen goods, five (5) years consecutive for forgery and ten (10) years consecutive for assault and battery first degree, resulting in an aggregate sentence of twenty (20) years. A timely notice of intent to appeal was filed and the direct appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). In April of 2013, prior to the South Carolina Court of Appeals deciding the direct appeal, Petitioner moved to drop his appeal. On July 3, 2013, the Court of Appeals dismissed the appeal. State v. Taylor, Op. No. 2013-UP-308 (S.C. Ct.App. filed July 3, 2013).

On April 11, 2013, the same month that Petitioner moved to drop his direct appeal but before the Court of Appeals decided the direct appeal, Petitioner filed an application for post-conviction relief [PCR]. Although the direct appeal was still pending, the State did not move to dismiss the PCR action and the parties proceeded accordingly after the direct appeal was dismissed pursuant to Anders. On October 1, 2015, the State filed a return. On April 18, 2016, an evidentiary hearing was held before the Honorable Perry H. Gravely. Aimee J. Zmroczek represented Petitioner at the PCR hearing. Johanna C. Valenzuela represented the State. In a written order signed May 1, 2016, Judge Gravely denied relief and dismissed the application. On

June 17, 2016, Petitioner filed a timely motion to reconsider. On December 5, 2016, the State filed a return to the motion to reconsider. Judge Gravely denied the motion to reconsider in a written order signed January 18, 2017. A timely notice of intent to appeal was served on February 28, 2017. This appeal follows.

ARGUMENT

The guilty plea was rendered involuntary by counsel's failure to explain to Petitioner that the plea judge could order the sentences to be served consecutively.

The judge sentenced Petitioner to three consecutive sentences resulting in an aggregate sentence of twenty (20) years. During the PCR hearing Petitioner testified that plea counsel advised him that he would receive a sentence of no more than ten (10) years. (App. p. 66, lines 1-24). Petitioner's mother testified that she understood that Petitioner would be receiving a sentence of ten (10) years. (App. p. 93, lines 1-5; lines 21-22). Plea counsel testified at the PCR hearing that initially the State refused to reduce the charges but offered **concurrent** time. (App. p. 103, lines 1-7). Plea counsel testified that the State eventually agreed to reduce the attempted murder charge to assault and battery first degree. (App. p. 103, lines 8-13). The State offered to allow Petitioner to plea to assault and battery first degree, forgery and possession of stolen goods with no agreement as to sentencing. (App. p. 103, lines 13-17).

Plea counsel testified:

Now, when I explained all of this to Mr. Taylor, I think what I must have done is that I still had in my head the idea about concurrent time. So that was my impression of what the sentence would be, because I didn't think the solicitor has a problem with that. So I told Mr. Taylor what he was pleading to, I told him what the maximum sentences were on each, I told him that I would be asking for concurrent time, and I told him that my understanding was that the State didn't have a problem with that, and that I expected that he would get ten years.

(App. p. 103, line 18 – p. 104, lines 1-6). Plea counsel testified that Dale Scott, the prosecutor with whom she had been dealing, was not present for the guilty plea because he was involved in another trial and handed the file over to another prosecutor. (App. p. 104, lines 10-25). Plea counsel read from an e-mail to Mr. Scott confirming the guilty plea. (App. p. 106, lines 11-17). There was no mention of consecutive time. While plea counsel testified that she did not

“promise” Petitioner that he would receive concurrent sentences, she fully expected the judge to impose concurrent sentences. (App. p. 113, line 9 – p. 114, lines 1-10). In regard to the merits of the attempted murder charge, plea counsel believed the charges were more fairly characterized as assault and battery first degree. (App. p. 109, lines 3-22). Plea counsel also testified that, prior to the plea, she was unaware that the “victim” was serving time in the Department of Juvenile Justice [DJJ] for attempted murder. (App. p. 115, line 17 – p. 116, lines 1-4).

On cross-examination plea counsel was asked, “When you were – just talking about the ten years, you still had in your mind believed that the concurrent sentences, as you and Mr. Scott had been discussing throughout your negotiations was still on the table?” (App. p. 114, lines 16-20). Plea counsel answered, “I thought in my head that when we negotiated the charges that we did so with the intent of those maximum number of – the maximum number being -- the highest number being the sentence. I thought Mr. Scott believed that he would get ten years, as well as I did. He wasn’t there, so – things ended up going poorly. But to be clear, the plea offer was no agreement as to sentencing.” (App. p. 114, line 21 – p. 115, lines 1-4). Plea counsel testified that she thought Petitioner believed that he would receive a ten year sentence. (App. p. 119, lines 7-16).

The plea judge advised Petitioner that assault and battery first degree carried a maximum sentence of ten years, possession of stolen goods carried a maximum sentence of ten years and forgery carries a maximum sentence of five years. (App. p. 18, lines 7-17). Petitioner also faced a probation revocation. (App. p. 18, lines 21-23). Petitioner received three consecutive sentences. (App. pp. 39-41). Additionally, the plea judge revoked probation in full and it appears that the full revocation resulted in an additional three year consecutive sentence. (App. p. 31, lines 2-7; p. 43). The probation revocation is not being challenged. The plea judge told

Petitioner, “So you’re facing the possibility of 25 years on these three charges that you’re pleading guilty on. In addition, it appears that there’s some time hanging over your head on – three years on the probation matter. Do you understand that?” (App. p. 19, lines 9-13). The plea judge, however, did not explain the nature of consecutive sentencing.

During the PCR hearing Petitioner testified on cross examination, “It was never that I’d get the maximum sentence. She said it was zero to ten and she told me that I’d receive no more than ten years. I believed her. I firmly believed her.” (App. p. 81, lines 10-14). Petitioner introduced a copy of the sentencing reflecting the zero to ten year notation. (App. p. 124). Petitioner testified that the only reason he pled guilty was because he thought he would receive a sentence of not more than ten years. (App. p. 72, line 23 – p. 73, lines 1-4).

In the order of dismissal the PCR judge wrote, “To the extent Applicant’s counsel misinformed Applicant of his possible sentence prior to the plea, the plea judge advised him of the correct sentences at the plea hearing and thereby cured any misconception.” (App. p. 132). Earlier in the order, the PCR judge wrote, “Counsel testified she did tell Applicant about the maximum sentences for each charge, but she did not remember explaining consecutive sentences to him. Finally, while counsel was expecting the sentence to be ten years and communicated that to applicant, she never made any promises.” (App. p. 131). The record does not support the finding by the PCR judge. Plea counsel was ineffective in failing to explain to Petitioner that the plea judge could order the sentences to be served consecutively. While the plea judge advised Petitioner what each charge carried separately, like trial counsel, he did not explain consecutive sentences and his brief comment that Petitioner faced twenty-five years could not have cured the misconception.

The PCR judge additionally found that Petitioner failed to prove prejudice writing, “this Court also finds that given the overwhelming evidence of guilt and the fact the State was reducing the charge from attempted murder to assault and battery, first degree – a charge that aligned with the anticipated trial strategy – Applicant has not met his burden of proving he would not have pleaded guilty and would have gone to trial. (App. p. 133). The record does not support the PCR judge’s finding as to prejudice. There was not overwhelming evidence of guilt on the attempted murder charge. Plea counsel testified that if Petitioner had not accepted the plea to assault and battery, he would have gone to trial for attempted murder. (App. p. 109, lines 14-22). Plea counsel testified that during the trial for attempted murder Petitioner could have asserted that there was no intent to kill. (App. p. 110, line 18 – p. 111, lines 1-14). Additionally, the “victim” was serving time for attempted murder.

Petitioner testified that the only reason he pled to assault and battery first degree was because he believed he would receive a ten year sentence. (App. p. 72, line 23 – p. 73, lines 1-4). Based on the fact that neither plea counsel nor the plea judge discussed the idea of consecutive sentences, Petitioner’s belief was reasonable. There is a reasonable probability that if Petitioner had known that he faced the maximum consecutive sentences, he would have taken his chances at a trial for attempted murder and the jury acquitting or finding him guilty of a lesser included offense. Plea counsel testified that if there had been a conviction at trial, the remaining charges would probably have been resolved in some type of plea negotiation. (App. p. 109, line 23 – p. 110, lines 1-17).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations

of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses

of action open to the defendant.’ ” Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Id. Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. id.

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

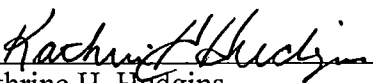
Petitioner’s guilty plea was not entered into voluntarily because he was not aware of the maximum penalty. Plea counsel was ineffective in failing to advise Petitioner that the judge could impose consecutive sentences. The plea judge did not mention consecutive sentences. The plea judge’s brief statement that Petitioner faced twenty-five years on the charges does not cure the misconception. Petitioner was unaware of the maximum **consecutive** sentence he could

receive. There is a reasonable probability that, but for counsel's error, Petitioner would not have pled guilty, but would have insisted on going to trial.

The present case is distinguished from Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000) because Roddy acknowledged during the PCR hearing that he knew that the judge could impose consecutive sentences. In the present case Petitioner was unaware of the possibility of consecutive sentences. In the order of dismissal the PCR judge wrote that plea counsel did not remember explaining consecutive sentencing. The judge's brief comment that Petitioner faced twenty-five years, without explaining consecutive sentencing, was not adequate to advise Petitioner of the maximum consecutive sentence he faced. The present case is also distinguished from Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). In Moorehead both plea counsel and the plea judge explained the maximum sentence. In the present case neither plea counsel nor the plea judge explained consecutive sentencing. Petitioner's belief that he would receive a ten year sentence was not wishful thinking but rather a reasonable belief based on plea counsel's and the pleas judge's failure to explain consecutive sentencing. The guilty plea was not voluntary.

CONCLUSION

Based on the above argument this Court should grant the petition for writ of certiorari to allow for further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

JALON TED TAYLOR,

PETITIONER

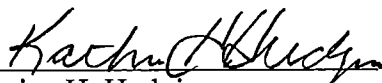
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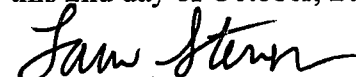
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Jalon Ted Taylor, #350159, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 2nd day of October, 2017.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 2nd day of October, 2017.



Notary Public for South Carolina (L.S)
My Commission Expires: July 5, 2027.